

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHRISTINA M LOPEZ,

Plaintiff,

v.

MICHAEL J. ASTRUE,

Defendant.

CASE NO. C12-1810-MJP

ORDER ON OBJECTIONS AND
ADOPTING REPORT AND
RECOMMENDATION

This matter comes before the Court on Plaintiff's objections to the Report and Recommendation (R&R) of the Honorable Brian Tsuchida, United States Magistrate Judge. (Dkt. No. 26.) Having reviewed Plaintiff's complaint (Dkt. No. 6), the Administrative Record (Dkt. No. 14), the parties briefing (Dkt. No. 21, 24, 25), the Report and Recommendation (Dkt. No. 26), Plaintiff's objections (Dkt. No. 27), the government's response (Dkt. No. 28), and the remaining record, the Court ADOPTS the Report and Recommendation, AFFIRMS the Commissioner's decision, and DISMISSES this action with prejudice.

Plaintiff seeks judicial review of the final administrative decision of the Commissioner of Social Security denying her applications for disability insurance benefits under Title II of the

1 Social Security Act and for Supplemental Security Income benefits under Title XVI. Plaintiff
 2 had applied for disability insurance benefits in March 2009. Her claim for benefits was denied
 3 twice. An Administrative Law Judge (“ALJ”) found Plaintiff was not disabled. Following that
 4 decision, Plaintiff sought review and presented additional evidence to the Appeals Counsel,
 5 which did not remand the case for additional proceedings. Judge Tsuchida recommended
 6 affirming the Commissioner’s decision and dismissing the case with prejudice. (Dkt. No. 26.)

7 Plaintiff objects to the R&R on the grounds Judge Tsuchida applied the wrong legal
 8 standard for Appeals Council’s consideration of new evidence. She claims the Appeals Counsel
 9 should have remanded the case to the ALJ for consideration of the new evidence. She claims it
 10 is a *per se* legal error for this Court to consider evidence never before the ALJ. (Dkt. No. 2.)

11 Plaintiff’s argument misstates the law in this Circuit. In Brewes v. Comm’r of Soc. Sec.
 12 Admin., 682 F.3d 1157 (9th Cir. 2012), the Ninth Circuit held:

13 Accordingly, we hold that when the Appeals Council considers new evidence in
 14 deciding whether to review a decision of the ALJ, that evidence becomes part of
 15 the administrative record, which the district court must consider when reviewing
 the Commissioner’s final decision for substantial evidence.

16 Id. at 1163. This Court must consider the record as whole, including evidence never before the
 17 ALJ and determine whether that evidence substantially supports the ALJ’s decision. Id. Judge
 18 Tsuchida did not err in considering the evidence submitted to the Appeals Counsel. Nor does
 19 SEC v. Chenery Corp., 332 U.S. 194 (1947), a pre-Brewes case, which did not address evidence
 20 presented to an Appeals Counsel, require remand whenever new evidence is offered after the
 21 ALJ’s decision. As Brewes mandates, the correct procedure for the district court is to determine
 22 if the new evidence deprives the ALJ decision of substantial support. This is exactly the
 23 approach taken by the R&R.
 24

1 Plaintiff argues by considering the new evidence, the R&R added missing rational to the
2 ALJ's decision, which constitutes a legal error. The only instance pointed to by Plaintiff is
3 evidence submitted regarding her worsening condition. But, under Brewes, this Court must
4 ensure the ALJ's decision contains sufficient support, which Judge Tsuchida did. Moreover, as
5 the Respondent correctly notes, the proper remedy is for Plaintiff to file a new application for
6 benefits of supplemental social security income.

7 The Court does note instances where the R&R refers to the materiality standard of Mayes
8 v. Massanari, 276 F.3d 453, 462 (9th Cir. 2001), which is the incorrect legal standard. But, these
9 were passing references and the R&R correctly reached its conclusion by applying the standard
10 in Brewes. (Dkt. No. 26 at 6.)

11 Conclusion

12 Because Judge Tsuchida applied the correct legal standard, the Court ADOPTS the
13 Report and Recommendation, AFFIRMS the Commissioner's decision, and DISMISSES this
14 action with prejudice. The clerk is ordered to provide copies of this order to all counsel and to
15 Judge Tsuchida.

16 Dated this 11th day of June, 2013.

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19 Marsha J. Pechman
20 Chief United States District Judge
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